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IN THE

Supreme Court of the United States

MUSIC SQUARE CHURCH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Federal Circuit and the United States Court of Claims err in concluding that Congress intended to and did engage in a futile legislative act by, on the one hand, imposing on the IRS a two-year limitation period within which it "shall" complete a church tax status examination authorized by the Church Audit Procedures Act (CAPA), 26 U.S.C. § 7611, and, on the other hand, providing in another subsection of the same statute that the two-year limitation period is unenforceable?

2. Does the court of appeals' conclusion that the two-year limitation period is illusory despite the mandatory language in which it is couched defeat Congress's intent, in enacting CAPA, to create protections for churches against overly intrusive and lengthy tax examinations?

3. Did the court of appeals err in concluding that the plain meaning of the term "requirements," as used in 26 U.S.C. § 7611(e)(2), includes – and thereby renders illusory – the limitation period set forth in 26 U.S.C. § 7611(c)(1), despite the fact that the statute, in specifically denominating certain of its provisions as "requirements," nowhere denominates or defines the limitation period as a "requirement"?

4. Does the court of appeals' decision conflict with the decisions in *United States* v. *Church of Scientology Western U.S.*, 973 F.2d 715 (9th Cir. 1992), *cert. dismissed*, 510 U.S. 910 (1993) and *United States* v. *Church of*

Scientology of Boston, Inc., 933 F.2d 1074 (1st Cir. 1991) (Breyer, J.), by effectively rendering unenforceable (except for the limited remedy provided by the stay provision of § 7611(e)(1)) all the provisions of CAPA, and not merely those provisions which the statute specifically denominates as "requirements"?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Music Square Church petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The July 13, 2000 judgment of the United States Court of Appeals for the Federal Circuit affirming the United States Court of Federal Claims' dismissal of petitioner's complaint is unreported (App. A, *infra*, 1a). The July 13, 2000 opinion of the United States Court of Appeals for the Federal Circuit affirming the United States Court of Federal Claims' dismissal of petitioner's complaint is reported at 218 F.3d 1367 (App. B, *infra*, 2a-14a). The April 15, 1999 judgment of the United States Court of Federal Claims dismissing petitioner's complaint with prejudice is unreported (App. C, *infra*, 15a). The April 30, 1998 order of the district court, "striking" petitioner's "argument" that the IRS's revocation of petitioner's tax-exempt status was invalid because the IRS violated the two-year limitation period imposed by 26 U.S.C. § 7611(c), is unreported (App. D, *infra*, 16a-17a). The August 24, 1998 order of the district court denying petitioner's motion for reconsideration of the April 30, 1998 order and for summary judgment is unreported (App. E, *infra*, 18a-23a).

JURISDICTION

The opinion of the court of appeals for which review is sought was entered on July 13, 2000 (App. B, *infra*, 2a-14a).

The jurisdiction of the Court to review the decision of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutes are reproduced in App. F, *infra*, 24a-36a.

STATEMENT OF THE CASE

The Church Audit Procedure Act, 26 U.S.C. § 7611 ("the Act," "the statute," or "CAPA"), was "specially enacted to add protections for churches from possibly unfounded or overly intrusive tax examinations." *United States* v. *Church of Scientology Western U.S.*, 973 F.2d 715, 720 (9th Cir. 1992). *Accord, United States* v. *Church of Scientology of Boston, Inc.*, 933 F.2d 1074, 1076 (1st Cir. 1991) (Breyer, J.) (CAPA "offers churches special protections"). The protections introduced by the Act include a two-year limitation on the length of a church tax examination set forth at 26 U.S.C. § 7611(c)(1) and a restriction upon the Internal Revenue Service's subpoena power to only those documents that the IRS can show are "necessary" to its investigation. The Act also imposes a number of specifically denominated "requirements" upon the IRS, including that certain notices and a conference be provided to a church before the IRS undertakes an examination or takes adverse action. Another subsection of the statute (§ 7611(e)(2)) states that the only remedy for IRS violation of the Act's "requirements" is a stay of proceedings, which does not toll the running of the two-year limitation period. Nowhere in the statute is the two-year limitation period referred to as a "requirement."

In this case, however, the IRS took more than six years to complete its examination, revoked the petitioner's tax-exempt status, and then successfully argued that the two-year limitation period is unenforceable under subsection (e)(2). Thus, the central issue raised by the instant petition is whether the term "requirements" in § 7611(e)(2) refers to only the various obligations specifically denominated as "requirements" in the statute, or whether it refers to both those "requirements" and the statute's other provisions – such as the two-year limitation and, as logic would dictate, the "necessity" restriction of § 7611(b) – that are not denominated "requirements," thereby rendering those other provisions utterly meaningless and unenforceable.

Petitioner Music Square Church ("the Church") is a religious organization that shelters and rehabilitates homeless individuals and addicts, operates evangelical centers, and disseminates religious information in several states. In 1981, the IRS recognized the Church as a tax exempt organization under 26 U.S.C. § 501(c)(3). On October 13, 1989, the IRS initiated a church tax status inquiry of the Church pursuant to 26 U.S.C. § 7611(a)(3) of CAPA by sending it a Notice of Church Tax Inquiry. On December 20, 1989, the IRS transformed the preliminary inquiry into an examination by sending a Notice of Church Examination, pursuant to 26 U.S.C. § 7611(b)(2) of CAPA. The December 20, 1989 notice informed the Church that if it failed to provide information and request a conference within 15 days, the IRS would undertake an examination of the Church's financial records with respect to tax years 1986, 1987 and 1988. In initiating the inquiry and

examination, the IRS proceeded in accordance with the Act's "notice requirements,"[1] which require the Service, *inter alia*, to "explain the concerns which gave rise to [the] inquiry," to notify the church "at least 15 days before the beginning of [the] examination," and to provide the church with "reasonable time to participate in a conference . . . if the church requests such a conference before the examination." 26 U.S.C. § 7611(a)(3) and (b)(2) (*infra*, 25a-27a).

Early in 1991, the IRS sought to obtain the Church's consent to an extension of the two-year "limitation on the period of examination" imposed by subsection (c) of CAPA.[2] To comply with that "limitation," the Service was required to complete its examination by December 20, 1991. A letter of February 8, 1991 from IRS agent Larry Howlett to Neal Pendergraft, the church's attorney, indicates that the two correspondents had, a month earlier, "discussed the taxpayer's president signing a consent to extend the examination period."[3]

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[1] *See* 26 U.S.C. § 7611(a)(3) (entitled "Inquiry Notice Requirements"); § 7611(b)(2) (setting forth the examination notice provisions and explicitly referring to "the requirements of this paragraph"); and § 7611(e)(1)(A) (referring to the "notice requirements of subsection (a) or (b)").

[2] *See* 26 U.S.C. § 7611(c)(1)(A) (*infra*, 27a) (imposing a "limitation on [the] period of inquiries and examinations," to wit: the IRS "*shall* complete any church tax status inquiry or examination (and make a final determination with respect thereto) not later than the date which is 2 years after the examination notice date") (emphasis added).

[3] *See* 26 U.S.C. § 7611(c)(2)(B) and (C) (allowing suspension of limitation for up to six months if church fails to comply with reasonable IRS request, and for "any period mutually agreed upon by the Secretary and

On May 28, 1991, Howlett sent Pendergraft a consent form-letter (dated May 8, 1991), which Pendergraft signed and returned. The consent form provided for a "suspension of the running of the two year examination period provided in IRC section 7511(c)(1)(A) which began on December 21, 1989, for completing the subject church tax examination from the date this consent is entered into . . . to December 31, 1992 . . . ."[4/]

The record also includes an internal IRS form entitled "Expedite: Church Case: IRC 7611 Time Limits." The date "May 28 1991" is written in hand next to the words "Consent secured to extend 2-year period," and the date "July 24 1993" is written in a corresponding line in a column entitled "expiration date." The "Expedite" form shows that the IRS recognized its obligation to meet the time limitation imposed by CAPA. Nonetheless, when the new statutory deadline of July 24, 1993 passed, the IRS had failed to complete its examination of the Church. The examination, in fact, continued for nearly *three years* after the deadline imposed by CAPA, even with the eighteen-month extension. (*See infra*, App. B at 3a.) During this entire period, the IRS gave no further sign of examination-related activity; yet, on April 15, 1996 – *i.e.*, nearly 33 months after the July 24, 1993 deadline – the IRS issued a Final Adverse Determination letter and revoked the Church's status as an exempt organization pursuant

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the church").

[4/] The Church disputed that its attorney had the authority to sign the consent form-letter, but, for reasons set forth in the following paragraph, whether or not he did have that authority is irrelevant.

to 26 U.S.C. § 501(c)(3), effective April 3, 1981. At no time during this period did the IRS obtain (or seek) further consent for an extension from either the Church or its attorney.

In July 1996, the Church filed a petition for declaratory relief pursuant to 26 U.S.C. § 7428 in the Court of Federal Claims ("the claims court"), challenging the revocation on several grounds, including the IRS's failure to comply with the time limitation established by CAPA. In June 1997, the Church filed a motion for summary judgment, seeking a determination that the IRS's Final Notice of April 15, 1996, issued more than six years after the initiation of the church tax examination, was void as untimely.

In a brief order issued on April 30, 1998, the claims court denied the motion for summary judgment. The court held that 26 U.S.C. § 7611(e)(2), which provides that "[n]o suit may be maintained, and no defense may be raised in any proceeding . . . by reason of any noncompliance by the Secretary with the requirements of this Section," precluded the Church's claim under section 7611. App. D, *infra*, 16a-17a. The court then ordered petitioner's "argument" concerning the two-year limitation period "stricken . . . from this case." *Id.* The Church sought clarification of the order and moved orally for reconsideration. On August 24, 1998, the court denied the motion for reconsideration and provided a fuller explanation of the court's basis for denying the Church's motion for summary judgment. The August 24, 1998 order also denied the government's intervening motion to dismiss the petition.

On September 15, 1998, the claims court denied the Church's motion for certification of an interlocutory appeal

pursuant to 28 U.S.C. § 1292. On April 9, 1999, the parties entered into a stipulation in which the Church agreed to the dismissal of its complaint with prejudice, but without prejudice to its appeal of the denial of its motion for summary judgment. Accordingly, on April 15, 1999, the claims court dismissed the complaint with prejudice, and the Church thereafter appealed the court's denial of the summary judgment motion to the United States Court of Appeals for the Federal Circuit ("the court of appeals"). The Church argued that both the plain meaning and structure of the statute, the legislative history, and the statute's interpretation in two previous decisions from other circuits, all compelled the conclusion that the time limitation imposed by 26 U.S.C. § 7611(c) was not a "requirement" as that term is used in § 7611 generally or in § 7611(e)(1) or (2).

The court of appeals affirmed the claims court's denial of the motion for summary judgment and its dismissal of the action (App. B, *infra*, 13a-14a). It held that the time limitation set forth in 26 U.S.C. § 7611(c) was one of the "requirements" referred to in 26 U.S.C. § 7611(e)(2), and that the precedents from other circuits cited by the Church were inapposite, because the other circuits purportedly did not consider the effect of § 7611(e)(2). Since the time limitation was a "requirement," the court of appeals concluded that it could not be enforced, but was merely "goal-oriented, or precatory in effect." (App. B, *infra*, 8a).[5/]

[5/] The court of appeals also agreed with the claims court in rejecting a government argument that, under 26 U.S.C. § 7611(i)(4), CAPA does not apply to this case at all because the Church allegedly willfully attempted to evade taxes in 1986, 1987 and 1988. The court stated: "The facts relied

REASONS FOR GRANTING THE WRIT

This case presents serious and substantial questions concerning the construction and application of an act of Congress where the court of appeals acknowledges that its construction renders one (indeed, many) of the act's key provisions totally unenforceable, and where, although the court of appeals does not acknowledge the conflict, its decision in fact directly conflicts with the previous decisions of two other circuits. The petitioner was denied its basic right, guaranteed to it by the Church Audit Procedure Act, to be free from an overly lengthy, intrusive tax examination.

The court of appeals' decision is thus singularly extraordinary. The case is rare indeed, if not unique, where a federal court has held that a limitation upon government action imposed by an Act of Congress is rendered unenforceable by the very Act itself, and that Congress *intended* to undertake a legally meaningless gesture. Such a holding can undermine public faith and confidence in the legislative process, suggesting that Congress engages in duplicitous and cynical acts. The problem is particularly acute where, as here, the Act of Congress was intended to benefit a class (here, churches) to further the principles of the First Amendment.

The Court should grant certiorari to determine whether Congress engaged in such a meaningless action; to restore to

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upon by the government to show [the Church] as a willful tax evader . . . add up to less than that conclusion" (App. B, *infra*, 13). The government's twice-rejected fact- and record-based arguments provide no basis for denying this petition.

CAPA the "limitation" upon the IRS's action that Congress intended; to resolve the conflict in the circuits; and to provide further guidance and criteria to the lower federal courts to insure that CAPA is enforceable.

I. The Court of Appeals Erred in Holding That the Time Limitation Established by 26 U.S.C. § 7611(c) Is Merely "Precatory" and Unenforceable

The IRS took nearly six years to complete its tax status examination of the Church. The IRS concedes that, even with the disputed one-and-a-half-year extension, it failed to comply with the two-year "limitation period" that CAPA imposes on church tax inquiries, and the IRS does not claim that, beyond the agreed-upon extension, it met any of the specific grounds for tolling the limitation period that CAPA also sets forth. *See* 26 U.S.C. § 7611(c)(1) (the IRS "*shall* complete any church tax status inquiry or examination" within two years) (emphasis added); § 7611(c)(2)(B) and (C) (stating that the running of the two-year period "*shall* be suspended" if certain types of judicial proceedings are brought during the examination, or if the church fails to comply with reasonable requests for records) (emphasis added).[6]

This is not the first case that documents an IRS failure to meet the deadline imposed by CAPA. Previously, the IRS acknowledged that if it failed to complete a church tax status examination within the limitation period, it had to close the

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[6] For the mandatory effect of the word "shall," emphasized by many courts, *see, e.g.*, *Firebaugh Canal Co.* v. *United States*, 203 F.3d 568, 573-74 (9th Cir. 2000).

examination without revoking the church's tax-exempt status. *See, e.g., Founding Church of Scientology of Washington, D.C.* v. *United States*, 26 Cl. Ct. 244, 245 (United States Claims Court 1992) ("[T]he IRS notified [the examined church] that it was unable to complete its examination within the two-year period provided by I.R.C. § 7611(c)(1)(A) and that, as a result, there would be no change in [the church's] tax status.").

The IRS reversed its prior position in this case, without explanation and without even acknowledging that it had done so. It now argues, and the courts below held, that a church has no judicial remedy whatsoever for IRS noncompliance with the mandatory two-year limit of § 7611(c)(1).[7/] The court of appeals based its decision on what it claimed to be the "plain language" of § 7611(e)(2). In reaching its decision, however, the court in fact ignored the plain language of § 7611(e)(2) and failed properly to consider the language and structure of § 7611(e) as a whole.

I.R.C. § 7611(e) is entitled "Information Not Collected in Substantial Compliance with Procedures to Stay Summons Proceeding," and both paragraphs (e)(1) and (e)(2) essentially address that issue; certainly they do not address the unrelated issue of the § 7611(c)(1) time limitation for completion of a

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[7/] The court of appeals denied that a lack of judicial remedy followed from its decision, and asserted that a church "would have a remedy under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, for a violation of a requirement of section 7611." (App. B, *infra* at 12a.) It is not at all clear, however, how a judicial remedy could exist under the APA for noncompliance with a statutory obligation that the court of appeals has held to be unenforceable.

church tax examination. Subsection 7611(e)(1) sets forth a specific list of "requirements" contained in CAPA, and states that if the Service fails to comply with those "requirements," proceedings will be stayed until the IRS has corrected the noncompliance. Notably, the subsection explicitly provides that the two-year limitation of § 7611(c)(1) is *not to be suspended* during this stay. The subsection also provides cross-references to the three earlier subsections in which the listed "requirements" are set forth: namely, subsections (a), (b) and (d), *but not (c), which imposes the two-year limit.* The defined "requirements" of subsection (e)(1) are: (1) the "notice requirements" of § 7611(a) and (b); (2) the "conference requirement" of § 7611(b)(3)(A)(iii)); and (3) the "approval requirement" of § 7611(d)(1)(B)(ii)). A fourth "requirement" is also set forth in the statute: namely, the "reasonable belief requirement" of § 7611(a)(2).[8/] This "requirement" is not addressed in § 7611(e)(1).

After setting forth the rule regarding the stay of proceedings for noncompliance with these listed "requirements," the statute then immediately continues with § 7611(e)(2), which states:

> **Remedy to be exclusive.** No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in paragraph

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[8/] 26 U.S.C. § 7611(a)(2), entitled "reasonable belief requirements," states that the IRS may begin a church tax inquiry only if "an appropriate high-level Treasury official reasonably believes . . . that the church . . . may not be exempt . . . from tax [or] may be carrying on an unrelated trade or business . . . ." or business . . . ."

> (1)), by reason of any noncompliance by the Secretary with the requirements of this section.

Viewed in the context of the immediately preceding paragraph, § 7611(e)(2) merely announces that a stay followed by enforced compliance (rather than, *e.g.*, dismissal of the examination) is the exclusive remedy for noncompliance with each of the three "requirements" specifically listed in § 7611(e)(1). In addition, however, since § 7611(e)(2) uses the broad term "section," and not "subsection," it also establishes that there is no judicial remedy for the "reasonable belief requirement" set forth in § 7611(a)(2).

This scheme is logical. On the one hand, a stay, but without tolling of the limitation period, is the appropriate remedy for noncompliance with the notice, conference and approval requirements: the IRS is thus compelled to comply with the formal steps established by those requirements, and a church's right to a timely resolution of the investigation is preserved. On the other hand, it would be impracticable for courts to determine the "reasonableness," let alone the existence, of treasury officials' beliefs; indeed, the need to decide whether a stay should be imposed pending the court's determination that an official's beliefs have been formed, or have reached a threshold of reasonableness, would force the court into a time-consuming, subjective inquiry on a subsidiary issue. Congress' decision to exclude such an inquiry is unsurprising.

The court of appeals' holding that the limitation period set forth in § 7611(c)(1)(A) is also a "requirement," and hence merely "precatory," fails to account for the fact that § 7611(e)(1) expressly states that the limitation period will

continue to run during any stay of proceedings imposed as a remedy for the IRS's violation of the listed requirements. In fact, the purpose of § 7611(e)(1) is quite clear: it is to force the IRS to comply *in a timely fashion* with the notice, conference and approval "requirements" of § 7611(a), (b) and (d). That is exactly why proceedings are *temporarily – i.e.*, without tolling the limitation period – to be stayed until the IRS complies with those "requirements." The court of appeals, however, concluded that the two-year limitation of § 7611(c)(1)(A) is one of the"requirements" referred to in § 7611(e)(2). If this conclusion is correct, it would follow that Congress, by enacting § 7611(e)(2), took the paradoxical measure not only of enacting an unenforceable two-year limitation period, but also of undoing the provision set forth in the immediately preceding § 7611(e)(1), according to which a stay of proceedings is *not to suspend* the limitation. Congress would be emphasizing the necessity of strict *compliance* with the limitation even during a judicially enforced stay, but, in virtually the same breath, would also be taking away any remedy whatsoever for *non*-compliance with the limitation.

Likewise, the court of appeals' construction of the statute renders superfluous the tolling provisions of § 7611(c)(2)(B) and (C), which "suspend" the running of the two year limitation period if certain judicial proceedings are brought during the examination or if a church fails to comply with reasonable requests for records. Congress certainly would not have bothered to establish specific tolling provisions if the two year limitation itself is unenforceable. The court of appeals' decision ignores this basic anomaly.

Given these facts, what the title of § 7611(e)(2), "remedy to be exclusive," plainly means is that a stay followed by enforced compliance is the *sole remedy* – as opposed to other possible remedies – for non-compliance with the "requirements" of § 7611(e)(1). In addition, it is clear that there is *no* remedy for a violation of the reasonable belief "requirement" set forth in § 7611(a)(2). The plain language of the statute, however, cannot support the further conclusion – *i.e.*, the conclusion reached by the court of appeals – that § 7611 obligations nowhere defined or denominated in the statute as "requirements," and which could not logically be enforced through a stay, have no remedy at all.

The relation between the use of the term "requirements" in § 7611(e)(2) and its use in the immediately preceding language of § 7611(e)(1), is confirmed by the language of the statute as a whole. The notice and conference requirements listed in § 7611(e)(1)(a) and (b) are explicitly, and without ambiguity, defined as "requirements" in the earlier subsections in which they appear. Indeed, the term "requirement" appears no less than nine times in § 7611(a) and (b). In addition, by expressly defining the obligation of the IRS regional counsel to determine in writing that there has been substantial compliance with the requirements of § 7611 as the "approval *requirement* of subsection (d)(1)," while making no reference to the other mandatory "limitations" set forth in § 7611(d)(2)(A) or (B),[9/] Congress explicitly defined which portion of § 7611(d) is a

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[9/] These subsections set forth three-year and six-year statutes of limitations (depending on whether or not the church's tax-exempt status is revoked) with regard to tax years for which the IRS seeks to collect taxes.

"requirement" within the meaning of § 7611(e)(2).[10/]

By contrast, the term "requirement" appears neither in, nor in connection with any reference to, subsection 7611(c), which categorically imposes a two-year "limitation." The court of appeals' opinion, in essence, effaces the "shall" of § 7611(c)(1) by holding that the words "the requirements of this section" in § 7611(e)(2) apply not only to the "requirements" specifically defined as such in the immediately preceding § 7611(e)(1) and in § 7611(a)(2), but also to the two-year time limitation, despite the fact that no portion of the statute – neither § 7611(e)(1) nor any other portion – denotes the limitation as a "requirement."

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." N. J. Singer, SUTHERLAND STATUTORY CONSTRUCTION Vol. 2A § 46.06 (5th ed. 1992). What is more, "[t]here is a presumption that the same words used twice in the same act have the same meaning." *Id.* The Court has stated that "[a] term appearing in several places in a statutory text is generally read in the same way each time it appears," and that "[j]udges should hesitate . . . to interpret statutory provisions 'so as to render superfluous other provisions in the same enactment.'" *Ratzlaf* v. *United States*, 510 U.S. 135, 143, 141 (1994) (internal quotation omitted). Statutory interpretation should

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[10/] The expression "the requirements of this section" also appears in § 7611(d), and clearly refers to the same requirements as the ones listed in § 7611(e)(1) and to the reasonable belief requirement of § 7611(a)(2).

"give effect, if possible, to every clause and word of a statute." *United States* v. *Menasche*, 348 U.S. 528, 538 (1955) (internal quotations omitted). In general, "[t]here is a presumption against a construction that would render a statute ineffective or inefficient." *Bird* v. *United States*, 187 U.S. 118, 124 (1902).

The court of appeals' interpretation of § 7611(e) directly violates these principles of statutory construction. Section 7611 uses the term "requirements" throughout in specific fashion, to denote certain of the enumerated obligations that CAPA imposes on the IRS. To hold, as the court of appeals did, that a key obligation set forth in the statute, and to which the term "limitation," but *not* "requirement," is applied, nonetheless is a "requirement" under § 7611(e)(2), is to render the statute's structural and linguistic scheme "superfluous." *Ratzlaf*, 510 U.S. at 141. In fact, the court of appeals' interpretation imposes two meanings on the word "requirements": each time the term is reiterated in §§ 7611(a), (b) and (e)(1), it means the enumerated obligations that it specifically and explicitly identifies, but in § 7611(e)(2) it means those enumerated obligations *plus other* obligations, never specifically identified as "requirements," as well. Only this strained duality allows the conclusion that the term "requirements" in § 7611(e)(2) destroys the meaning of the term "shall" in § 7611(c)(1) and, even more so, the tolling provisions of § 7611(c)(2), which could not possibly be interpreted as "precatory." That conclusion itself, however, violates the principles of efficiency and internal consistency. *See, e.g.*, *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (under an "elementary canon of

construction," a statute "should be interpreted so as not to render one part inoperative"); *Hurley* v. *Employment Security Division*, 612 F.2d 392, 394-95 (8th Cir. 1980) (scope of Rule 307 of Bankruptcy Procedure limited because otherwise "the finality sought to be established by the strict time limits of Rule 802 would be illusory"); *Anderson* v. *Dep't of Health and Human Services*, 907 F.2d 936, 944 (10th Cir. 1990) (adopting narrow definition of term because wider definition would create conflict with other provision in statute); *see also Williams* v. *Poulos*, 11 F.3d 271, 286 (1st Cir. 1993) (interpretation of RICO that would violate the principle that "each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole" rejected because it "would render the statue unenforceable").

If the word "requirements" only appeared in § 7611(e)(2), or if the statute specifically indicated that the scope of § 7611(e)(2) included § 7611(c), the court of appeals' decision would have been defensible. As the matter stands, neither the structure of § 7611(e) as a whole, nor that of the statute as a whole, allow one, in light of the rules of construction, to conclude that the term "requirements" in § 7611(e)(2) refers to the two-year "limitation" imposed by § 7611(c). Thus, by narrowly defining a list of "requirements" in § 7611 (a), (b) and (e)(1), and by emphasizing that the remedy of a stay pending compliance with the specified "requirements" of § 7611(e)(1) is not to suspend the two-year period, the statute makes clear that if the IRS fails to comply with the categorical time "limitation" of § 7611(c), then its authority to continue with the examination has simply expired.

II. The Court of Appeals' Ruling Conflicts with Two Circuit Court Precedents

If the court of appeals was correct in its interpretation of the words "any of the requirements of this section" in § 7611(e)(2), it must follow that there is no judicial remedy for noncompliance with any mandatory obligation imposed by CAPA (other than those specifically listed in § 7611(e)(1), for which a stay of proceedings is the sole remedy). Under the court of appeals' reasoning, the words "any of the requirements of this section" denote not only the denominated "requirements" of CAPA, but also all *other* obligations contained in the statute, whether the statute refers to them as "requirements," "limitations" or "restrictions." Among the statute's other mandatory provisions is § 7611(b)(1), which imposes a "restriction," namely, that the IRS must show that church documents are necessary to its examination before it can summon them. Thus, by the court of appeals' own reasoning, the necessity "restriction" imposed on the IRS by § 7611(b) must also be one of the "requirements" covered by § 7611(e)(2), although not referred to in § 7611(e)(1) or elsewhere as a "requirement."

Such reasoning is in direct conflict with two previous decisions from the First and Ninth Circuits, each of which *granted relief* where the IRS failed to meet its burden under § 7611(b)(1). *See United States* v. *Church of Scientology Western U.S.*, 973 F.2d 715 (9th Cir. 1992), *cert. dismissed*, 510 U.S. 910 (1993) and *United States* v. *Church of Scientology of Boston, Inc.*, 933 F.2d 1074 (1st Cir. 1991) (Breyer, J.). Each of these decisions held that § 7611(b)(1)

established a heightened standard (higher than the "relevance" standard applicable to non-church taxpayers)[11/] that the IRS must meet before it can enforce summonses against churches under examination. *Church of Scientology Western U.S.*, 973 F.2d at 719-20; *Church of Scientology of Boston*, 933 F.2d at 1077-78. In each of the *Church of Scientology* cases the IRS failed to meet the burden imposed by § 7611(b)(1); hence the two courts refused to enforce the IRS's summons, either in whole, *Church of Scientology of Boston*, 933 F.2d at 1075, 1079, or in part, *Church of Scientology Western U.S.*, 973 F.2d at 717, 721.

Despite the clear import of the *Church of Scientology* decisions, the court of appeals concluded, on the basis of the "requirements" language of § 7611(e)(2), that "Congress cannot have intended . . . that [§] 7611(c)(1) set forth a mandatory two year time limit," and that Congress in fact intended the limitation period set forth in § 7611(c)(1) to be merely "goal-oriented, or precatory in effect" (App. B, *infra*, 8a). Subsection 7611(c)(1), however, does not set forth the two-year limitation period with anything that could properly be described as "precatory" language. Rather, it clearly states that the IRS "shall" complete its examination within the two-year period. If Congress had merely desired to *recommend* that the IRS adhere to the two-year limitation, it could have achieved that end simply by using the terms "may" or "should" instead

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[11/] *See United States* v. *Powell*, 379 U.S. 48 (1964).

of "shall" in § 7611(c).[12/] In essence, the court of appeals rewrote the word "shall" of § 7611(c)(1) to nullify its effect. In rejecting a similar nullification argument with respect to the word "necessary" in § 7611(b)(1), the *Church of Scientology Western U.S.* court stated:

> The government's argument ignores the fact that the only purpose of section 7611(b)(1) is to articulate a restriction upon the scope of the government's inquiry. "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" . . . To read section 7611(b)(1) as imposing no special duty would reduce the provision to a nullity. Our observation about the intent of the statute is further bolstered by the legislative history which shows that the provisions were specially enacted to add protections for churches from possibly unfounded or overly intrusive tax examinations.

Church of Scientology Western U.S., 973 F.2d at 720 (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) and *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)). In this case,

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[12/] *See, e.g.*, *Redner* v. *Dean*, 29 F.3d 1495, 1500-1501 (11th Cir. 1994) (ordinance requiring city to approve or deny adult business license applications within 45 days created "illusory" rather than mandatory time limit by stating that if city exceeded limit "the applicant may be permitted" to engage in the expressive activity, instead of "shall be permitted"; statute held unconstitutional as prior restraint); *Artistic Entertainment, Inc.* v. *City of Warner Robins*, 2000 WL 1199230, *3 (11th Cir. Aug 23, 2000) (indicating that term "may" at issue in *Redner* was "precatory" rather than "mandatory"); *Secretary of the Interior* v. *California*, 464 U.S. 312, 323 (1984) ("should" in Senate report precatory; "shall" in statute mandatory).

the court of appeals' interpretation of the term "requirements" in § 7611(e)(2) does not "give effect, if possible, to every clause and word of [the] statute." *Id.* Rather, it arbitrarily "reduces the [two-year limitation] provision to a nullity," *id.*, despite the fact that the limitation period is not defined as a "requirement" and despite § 7611(e)(1)'s emphatic reminder that the "stay" remedy is *not to interrupt* the running of the limitation period.

Faced with the irreconcilability of its approach with that taken in the two *Church of Scientology* opinions, the court of appeals announced that the decisions in those cases "have no bearing" on this case (App. B, *infra*, 12a). The court simply stated that in the two earlier cases, the "violation of a procedural requirement of section 7611 was not asserted as a defense, nor as a basis for a declaratory judgment action," so that "the proper interpretation of subsection 7611(e)(2) was not directly, or implicitly, before the court in either of these cases" (*id.*).

This statement suggests that there is no conflict among the circuits simply because the *Church of Scientology* courts did not expressly address the issue of the proper interpretation of the word "requirements" in § 7611(e)(2). The implication is that if only the government had raised, and the First and Ninth Circuits considered, the impact of § 7611(e)(2), the results in those two cases would have been different. It is true that both of the *Church of Scientology* decisions granted relief under § 7611(b)(1) without discussing § 7611(e)(2), for the simple reason that the government never argued that the "requirements" clause precluded relief. Nonetheless, the two

Church of Scientology courts thoroughly examined the entire statute (then Circuit Judge Breyer noted that the "problem with [the government's] ingenious argument . . . is that the rest of the statute belies it," *Church of Scientology of Boston*, 933 F.2d at 1077), and neither court suggested that the terms of § 7611(e)(2) might preclude relief under § 7611(b)(1).

The court of appeals' statement that the "violation of a procedural requirement of section 7611 was not asserted as a defense" in the *Church of Scientology* cases is wrong on its face, for the IRS's failure to comply with one of CAPA's procedures – namely, the "restriction" set forth in § 7611(b)(1) – was precisely the basis for the defense against the summons that the government sought to enforce in those cases. Thus, the only way to make sense of the court of appeals' statement is to read it as contending that the necessity restriction of § 7611(b)(1) is not a "requirement" under § 7611(e)(2), because it is not *procedural* in nature.

Such an attempt to distinguish between the necessity provision of § 7611(b) as "substantive" and the two-year limitation of § 7611(c) as "procedural" is highly dubious. The distinction – for which the court of appeals offers no explanation whatsoever – would be based on three assumptions: that the limitation period of § 7611(c) is "procedural," that the government's burden under § 7611(b) is "substantive," and that the statutory scheme distinguishes between such "procedural" and "substantive" provisions. But nothing in § 7611(e)(2) or elsewhere in the statute distinguishes between "substantive" and "procedural" obligations. The plain language of § 7611(e)(2) speaks of "the requirements of this

section." Either the referential scope of these words is plainly limited to the "requirements" specifically denominated as such in §§ 7611(e)(1) and (a)(2), or else it plainly encompasses *all* of the obligations of § 7611, including the "limitation" of § 7611(c) and the "restrictions" of § 7611(b)(1).

At any rate, the two-year limitation on the IRS's power to revoke an exemption, at issue here, is certainly as "substantive" as the heightened burden of proof imposed upon the IRS by the "to the extent necessary" provisions of § 7611(b). For example, following the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity cases have systematically applied both state statutes of limitations and state burden of proof standards, precisely because they are considered "substantive," and not merely "procedural." *See Guarantee Trust Co. of New York* v. *York*, 326 U.S. 99 (1945) (statute of limitations); *Cities Service Oil Co.* v. *Dunlop*, 308 U.S. 208 (1939) (burden of proof).[13/] Indeed, the Court has held that the proper test for determining whether a federal court may *toll* a state statute of limitations is "not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 557-58 (1974).

To be sure, the legislative history includes the statement that

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[13/] Although criticized for their inexactness, *see York*, 326 U.S. at 108, the terms "substantive" and "procedural" are commonly used shorthand in determining whether a federal court sitting in diversity must follow a state or federal rule of decision.

"aside from the exclusive [stay] remedy . . . there is to be no judicial remedy for IRS violation of any of the church examination *procedures* provided by the conference agreement" (House Conf. Report No. 98-861, 98th Cong., 2d Sess. 1114 (1984), *reprinted in* 1984 U.S.C.C.A.N. Vol. 3 at 1802) (quoted by the court of appeals, App. B, *infra*, 9a) (emphasis added). The Conference Report's use of the word "procedures," however, provides no support for any distinction between the two-year limitation period and the necessity burden of persuasion on a procedural/substantive basis. Nothing in the legislative history indicates that the limitation period is an unenforceable "procedure," but that the necessity burden of § 7611(b)(1) is an enforceable "substantive" restriction. As the reference to the stay remedy indicates, the "procedures" referred to in the Report mean the notice, conference and approval procedures outlined in § 7611(e)(1).

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Congress re-enacted CAPA without any pertinent change in 1996 and 1998. Not only does the reasoning of the two *Church of Scientology* opinions indicate that § 7611(e)(2) does not apply to all of the statute's provisions, but, previously, the IRS itself understood that § 7611(e)(2) does not release it from its obligation to comply with the *two-year limitation period*, let alone the necessity burden. *See supra*, p. 9-10. Congress is presumed to have been aware of the two *Church of Scientology* opinions as well as of the IRS's assumption, and the statute should be

interpreted accordingly.

In fact, the broad reading of the term "requirements" proposed by the government is unacceptable precisely in light of the history of the "necessity" provisions of § 7611(b). By enacting the two subparagraphs of § 7611(b)(1), Congress strengthened the language of an earlier version of the statute to "add protections for churches from possibly unfounded or overly intrusive tax examinations."[14/] *Church of Scientology Western U.S.*, 973 F.2d at 720; *see also Explanation of Provisions Approved by the [Senate Finance] Committee on March 21, 1984*, Committee on Finance, United States Senate, Committee Print; 98th Cong. 2d Sess.; Senate Print 98-169 ("Finance Committee Explanations") ("there will be no diminution of any rights presently held by a church"). If, however, the government's interpretation of the term "requirements" in § 7611(e)(2) were correct, then Congress, in enacting § 7611(e)(2), would have *repealed* the earlier version of the statute by *eliminating* practically all judicial protections for churches in a tax audit. Congress, in perverse fashion, would have *deprived* churches of *any* enforceable protection under the necessity standard at the very same time that it extended that standard to both sets of inquiries. Thus, the

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[14/] In construing identical "to the extent necessary" language in former 26 U.S.C. § 7605(c), some courts had held that the "necessity" burden applied only to determinations of tax due, while others had held that it also applied to determinations of exempt status. As then Circuit Judge Breyer explained, Congress, in enacting § 7611(b), explicitly extended the protection of the necessity standard to both sets of inquiries. *See Church of Scientology of Boston*, 933 F.2d at 1077.

IRS's view would defeat Congress's general intent in enacting the statute as a whole, as well as its specific intent in enacting the necessity provisions, by removing any judicial remedy (apart from the "stay" of § 7611(e)(1)) for violation of most of the protections set forth in the statute. Such a view is at odds with the statute, its legislative history, and the First and Ninth Circuit opinions.

Ultimately, the court of appeals' assertion that because the two *Church of Scientology* cases dealt with the necessity burden rather than the "procedural" two-year limitation, they simply "have no bearing" on this case, is an arbitrary one unsupported by the language of the statute or the legislative history. The legislative history explicitly juxtaposes the special importance of the necessity and time limitation rules, by stating that the bill's provisions "*emphasize the need for a speedy determination of church tax liabilities and, where possible, a determination without unnecessary examination of church books and records.*" Finance Committee Explanations, Senate Print 98-169. As discussed *supra*, the approach taken by the *Church of Scientology* courts leads to the conclusion that *neither* the necessity provision, *nor* the time limitation provision, come within the purview of § 7611(e)(2), because the "requirements" referred to in § 7611(e)(2) are only the ones specifically *identified* as "requirements" anywhere in the statute. Thus, the *Church of Scientology* decisions do indeed conflict with the court of appeals' decision in this case, and their impact is not refuted or softened by the legislative history. The Court should resolve the conflict by holding that the statute's limitation period must be enforced so as not to defeat

Congress' intended goal: the protection of churches against overly lengthy and intrusive tax status examinations.

III. If § 7611(c) Is Unenforceable, Congress's Intent to Minimize Ongoing Intrusive Entanglements Between Government and Churches Would Be Defeated

Under the court of appeals' interpretation of the term "requirements" in § 7611(e)(2), church tax status examinations would be allowed to run for unlimited periods of time, despite the two-year limitation established in § 7611(c) and emphasized in §§ 7611(e)(1) and (f). The result would set a grave precedent not only in the context of such examinations, but in the realm of statutory interpretation in general.

To begin with, the evisceration of the two-year limitation period raises serious First Amendment concerns. Even in the case of mainstream religious organizations, overly lengthy examinations would likely have a chilling effect on donor and fund-raising activities that are otherwise entirely permissible and, indeed, protected by the Constitution. *See, e.g., Murdock* v. *Pennsylvania*, 319 U.S. 105, 108-12 (1943) (solicitation of funds by religious organization protected by First Amendment). But in the case of smaller and newer religious organizations, many of which are already the object of the general public's distrust, lengthy examinations would necessarily have an even more severe effect. The testimony that Congress had before it when it enacted CAPA illustrates this concern:

> [A]side from the financial burden, the cloud of an investigation hanging over the church for two and a half years damaged its reputation and dignity . . . We are here

> today to urge this committee to be receptive to the plight of small churches which have little resources to defend themselves from unwarranted IRS tax audits . . . [P]astors are not often tax sophisticates. They need the protection this proposed legislation would afford.

Church Audit Procedures Act: Hearing Before the Subcommittee on Oversight of the Internal Revenue Service of the Senate Committee on Finance, 98th Cong. 1st Sess. (Sept. 30, 1983) at 109 (statement of Robert Dugan, Jr.).

> Some of the small churches that have been investigated . . . have been completely distracted from their appropriate and legitimate ministries . . . . Their leadership is overwhelmed with the need to establish what is obvious, in order to remain a church. It is an anomaly that, as a result of an IRS investigation, a church must forfeit the opportunity to do its churchly duties in order to prove that it is a church.

Id. at 153 (statement of Arthur Borden).

Senator Grassley, one of the Act's sponsors, explained that the protections it sets forth are founded upon First Amendment principles:

> The entire issue of auditing churches must be viewed from a Constitutional perspective. . . . This interface between church and state needs to be examined by congress to be certain the First Amendment rights of churches are not trampled in the government's zeal to collect revenue.

Id. at 2.

As for the limitation period by which, among other means, such trampling was to be avoided, initially it was a *one*-year period, which, according to Senator Grassley, was "crafted to require the IRS to be focused and expeditious in its inquiry to avoid unconstitutional entanglement [between church and state]." *Id.* at 2. The Commissioner of the IRS, however, argued that one year was not enough, and proposed that "we should sit down . . . and try to work out" an appropriate limit. *Id.* at 62. Another witness asserted that "[t]he [IRS] would prefer to have the power to draw out the investigatory process and, in so doing, unreasonably pressure those under investigation to cooperate long after matters should have been resolved." *Id.* at 101-102 (statement of Ted Williams). Clearly, the two-year limitation that Congress ultimately adopted was an attempt to reconcile the needs of the IRS and the declared interest in preventing the unconstitutional entanglement between church and state.

"Excessive and enduring" entanglements between state and church violate the First Amendment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). *See also Committee For Public Ed. and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 780 (1973) ("intrusive and continuing" state-church entanglements may violate the First Amendment). Whether or not a potentially perpetual church tax status examination would create the type of government-church entanglement that the Court has described as "enduring," "continuing," "excessive" or "intrusive," the enactment of CAPA – and, in particular, of the two-year limitation period imposed by § 7611(c)(1) – clearly

emanated from congressional First Amendment concerns. Indeed, Congress's explicitly declared intent to strengthen protections for churches, together with the mandatory terms that the authors of the statute specifically adopted in § 7611(c)(1) and (2), make clear that the two-year limitation period is enforceable. Thus, by concluding, through a strained interpretation of the term "requirements" in § 7611(e)(2), that the limitation period is "precatory" – *i.e.*, illusory – the court of appeals violated the principle that "in interpreting a statute," the court will look to "the whole statute . . . and the objects and policy of the law, as indicated by its various provisions," and construe it so as to "carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." *Brown* v. *Duchesne*, 60 U.S. 183, 194 (1856).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
for the Federal Circuit.

MUSIC SQUARE CHURCH, Plaintiff-Appellant,
v.
UNITED STATES, Defendant-Appellee.

No. 99-5109.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 96-cv-396

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED July 13, 2000

/s/ JAN HORBALY
JAN HORBALY, Clerk

ISSUED AS A MANDATE: September 5, 2000

APPENDIX B

United States Court of Appeals
for the Federal Circuit.

MUSIC SQUARE CHURCH, Plaintiff-Appellant,
v.
UNITED STATES, Defendant-Appellee.

No. 99-5109.

DECIDED: July 13, 2000

Before NEWMAN, CLEVENGER, and SCHALL, Circuit Judges.

CLEVENGER, Circuit Judge.

Music Square Church (MSC) appeals the dismissal of its complaint with prejudice. See Music Square Church v. United States, No. 96-396T (Fed.Cl. Apr. 15, 1999). We affirm.

I

MSC is a church founded by Tony and Susan Alamo. The Internal Revenue Service (IRS) recognized MSC as a tax-exempt organization under 26 U.S.C. § 501(c) in 1981. In a Final Adverse Determination letter dated April 5, 1996, however, the Commissioner of Internal Revenue determined that MSC was not an organization described in 26 U.S.C.

§ 501(c), and revoked MSC's tax-exempt status effective April 3, 1981. The stated bases for the revocation were that: MSC was so closely operated and controlled by and for the benefit of Tony Alamo that it enjoyed no substantive independent existence; that MSC was formed and operated by Tony Alamo for the principal purpose of willfully attempting to defeat or evade federal income tax; and that MSC was inseparable from Tony Alamo, and failed to operate for exclusively charitable purposes.

MSC filed a Petition for Declaratory Relief (Exempt Organization) Pursuant to 26 U.S.C. § 7428 in the Court of Federal Claims, challenging the revocation of MSC's tax-exempt status because of the IRS' failure to comply with 26 U.S.C. § 7611(c)(1)(A), which requires that a church tax examination take no more than two years to complete. The IRS initiated its church tax inquiry of MSC on December 20, 1989 by sending a Notice of Church Examination, and the Final Adverse Determination letter issued on April 5, 1996; thus, the inquiry took over six years. Even with a one-and-a-half-year delay that may have been agreed to by the parties, the inquiry into MSC's exempt status exceeded the two year limitation by nearly three years.

MSC filed a motion for summary judgment, seeking a determination that the Final Notice of Adverse Determination was void as untimely. In a preliminary Order dated April 30, 1998, the Court of Federal Claims struck MSC's argument that the IRS' Final Determination letter was untimely, because section 7611(e)(2) barred MSC's claim concerning the two year limit of section 7611(c)(1)(A). Following MSC's request for reconsideration and clarification of this Order, the court issued

a second Order dated August 24, 1998, denying MSC's motion for summary judgment on the ground that under 26 U.S.C. § 7611(e)(2) and 26 C.F.R. § 301.7611-1, the failure of the IRS to comply with the time limit requirement of section 7611(c)(1)(A) could not be raised as an affirmative basis for relief in a declaratory judgment proceeding. On April 9, 1999, the parties entered into a stipulation for entry of judgment in which MSC agreed to the dismissal of its complaint with prejudice, but without prejudice to appeal the denial of its summary judgment motion. The Court of Federal Claims issued judgment dismissing the complaint with prejudice on April 15, 1999, and this appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (Supp.1999).

II

MSC's primary argument on appeal is that the proper interpretation of section 7611(e)(2) is that it merely sets forth the exclusive remedy for the violation of subsection 7611(e)(1), not for the entire section as held by the Court of Federal Claims. The government argues in response that section 7611(e)(2), properly interpreted, precludes MSC from attacking the Commissioner's revocation of its tax-exempt status on the ground that the Commissioner failed to conclude its audit of MSC in a timely fashion. As noted above, the Court of Federal Claims agreed with the government's position. We review the denial of a summary judgment without deference. *See Massie* v. *United States*, 166 F.3d 1184, 1187 (Fed.Cir.1999).

A

The only question presented for our review is whether subsection 7611(e)(2) precludes a defense to the Commissioner's revocation action based on the IRS' failure to comply with section 7611(c)(1). A review of the relevant statute will provide background for our inquiry. Section 7611, also known as the Church Audit Procedures Act, was added by section 1033(a) of the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). Section 7611 sets forth specific procedures for the IRS to follow with respect to examinations of churches. Under the provisions of subsection 7611(a), the Secretary of the Treasury may begin a "church tax inquiry" only if an appropriate high-level Treasury official reasonably believes, on the basis of facts and circumstances recorded in writing, that a church: (i) may not be exempt, by reason of its status as a church, from tax under 26 U.S.C. § 501(a); or (ii) may be carrying on an unrelated trade or business within the meaning of 26 U.S.C. § 513. In addition, before beginning the church tax inquiry, the Secretary must provide written notice to the church of the inquiry. See 26 U.S.C. § 7611(a)(3)(A), (B). The statute further provides that an examination of church records may begin only after written notice of the examination has been given and the church has been provided with an opportunity for a conference with the Secretary if it so requests. See id. § 7611(b). Subsection (c)(1), upon which MSC relies, provides in relevant part:

> The Secretary shall complete any church tax status inquiry or examination (and make a final determination with respect thereto) not later than the date which is 2

years after the examination notice date.

26 U.S.C. § 7611(c)(1)(A). Subsection 7611(c)(2) provides for the suspension of the two year period under certain circumstances.

As the result of an examination, the Secretary may determine that an organization is not a church that is exempt from taxation or an organization eligible to receive tax-deductible contributions, or the Secretary may issue a notice of deficiency to the organization or in certain cases, assess an underpayment of tax. See 26 U.S.C. § 7611(d)(1). The Secretary may do so, however, "only if the appropriate regional counsel ... determines in writing that there has been substantial compliance with the requirements of this section and approves in writing of such revocation, notice of deficiency, or assessment." Id. § 7611(d)(1)(B)(ii).

Section 7611(e) is the focus of this appeal. Under subsection 7611(e)(1), if there has not been substantial compliance with the notice requirements of subsection (a) or (b), the conference requirements of subsection (b)(3)(A), or the approval requirement of subsection (d)(1), then "with respect to any church tax inquiry or examination, any proceeding to compel compliance with any summons with respect to such inquiry or examination shall be stayed until the court finds that all practicable steps to correct the noncompliance have been taken." Id. § 7611(e)(1). Subsection 7611(e)(2) provides:

> **Remedy to be exclusive** - No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in [§ 7611(e)(1)]), by reason of any noncompliance by the Secretary with the requirements of this section.

As noted above, the parties disagree whether this provision states the exclusive remedy for violations of section 7611, and thus bars recovery for failure to comply with the time limit set forth in subsection 7611(c)(1).

B

The outcome of this case turns on the interpretation of subsection 7611(e)(2). We review issues of statutory interpretation de novo. *See INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). The objective when interpreting statutes is to give effect to the intent of Congress. *See NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 1 L.Ed.2d 331 (1957); *In re Portola Packaging, Inc.*, 110 F.3d 786, 788 (Fed. Cir.1997). To determine the congressional intent, we begin, of course, with the language of the statute at issue. *See Toibb* v. *Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991). Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)).

Subsection 7611(e)(2) expressly provides that "[n]o suit may be maintained, and no defense may be raised in any proceeding ... by reason of noncompliance by the Secretary with the requirements of this section," (emphasis added), with the exception of the limited grounds on which a church is permitted to seek a stay of any proceeding to compel

compliance with any summons issued in connection with a church tax inquiry or examination. The term "section," of course, refers to all of section 7611. Thus, by the plain language of the statute, a suit may not be maintained, nor may a defense be raised based on the violation by the IRS of subsection 7611(c)(1). Accordingly, we must acknowledge the clear intention expressed by Congress, that there is to be no judicial remedy for the IRS' failure to comply with any of the requirements in section 7611, aside from the exclusive remedy described in subsection 7611(e)(1). Congress cannot have intended, therefore, that subsection 7611(c)(1) set forth a mandatory two year time limit; accordingly, we conclude that that subsection was intended to be goal-oriented, or precatory in effect. *See, e.g., Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 11-18, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) (discussing whether statute created an implied cause of action).

MSC asserts, however, that the language and structure of section 7611 as a whole demonstrates that the exclusive remedy provisions set forth in section 7611(e)(2) were intended to be limited only to the requirements enumerated in subsection 7611(e)(1). According to MSC, Congress intended to use the word "subsection" in subsection 7611(e)(2), and that the use of the word "section" must have been a scrivener's error. In support of this conclusion, MSC relies on the following arguments. First, it asserts that the term "requirements" in subsection 7611(e)(2) refers only to the requirements in subsection (e)(1). MSC explains that section 7611 as a whole uses the words "requirements" and "limitations," while subsection 7611(e)(1) references only "requirements." Thus,

according to MSC, the reference to "requirements" in subsection 7611(e)(2) must refer only to the subsection 7611(e)(1) "requirements." In addition, subsection 7611(c)(1) states "[t]he Commissioner shall complete" a tax audit or examination within the two-year time limit. The use of the term "shall," argues MSC, indicates that the time limit is mandatory, rather than advisory, and that Congress thus did not intend to grant the IRS any discretion concerning compliance with the two year time limit. In light of this mandatory language, MSC asserts that Congress could not have intended to bar a remedy for violations of this subsection.

MSC's arguments are undone by the legislative history of subsection 7611(e). Put bluntly, the legislative history confirms Congress' intent that there is to be no judicial remedy for the IRS' failure to comply with any of the requirements in section 7611, aside from the exclusive remedy described in subsection 7611(e)(1). The House Conference Report states that "the exclusive remedy for any IRS violation of the church audit procedures" is the remedy provided in section 7611(e)(1). H. Conf. R. No. 98-861 at 113 [sic], reprinted in 1984-3 C.B., vol. 2, at 367 (emphasis added). The Report further states:

> Aside from the exclusive remedy described above [in section 7611(e)(1)], there is to be no judicial remedy for IRS violation of any of the church examination procedures provided by the conference agreement. IRS failure to comply with any of these requirements may not be raised as a defense or an affirmative ground for relief in any judicial proceeding including, but not limited to, a summons proceeding to gain access to church records; a declaratory judgment involving a

> determination of tax-exempt status (sec.7428); or a proceeding to collect unpaid tax.

Id. at 1114, reprinted at 1984-3 C.B., vol. 2, at 368. This legislative history confirms that Congress meant what it said when it used the term "section" in the statute. The government, quite understandably, relies heavily on this legislative history. MSC offers no counter but to say that it does not think that the two year audit time is a "church examination procedure."

Moreover, we disagree with MSC that the meaning of "requirements" compels the conclusion that Congress erred when it used the word "section," instead of "subsection." Subsection 7611(e)(1) sets forth the remedy for failure to satisfy the listed requirements. Subsection 7611(e)(1) does not, however, impose the requirements itself; the subsection merely references requirements imposed by other subsections of the statute, namely subsections 7611(a), (b), and (d). Moreover, inspection of the whole of section 7611 indicates that the term "limitations" is used somewhat interchangeably with the term "requirements." See, e.g., § 7611(d)(1) (listed as a "requirement" in subsection 7611(e)(1), but entitled "[l]imitations on revocation of tax-exempt status."). Nor are we convinced that the word "shall" in subsection 7611(c)(1)(A) overrides the clear import of subsection 7611(e)(2). When writing subsection 7611(e)(2), Congress was fully aware of all the "requirements" of the whole section. Had it wished to give compulsion effect to requirements other than those specified in subsection 7611(e)(1), it would have said so. MSC's assertion that Congress intended to give no discretion to the IRS is further belied by subsections 7611(d)(1) and (e)(1), which require "substantial compliance" with procedures or

requirements before the Secretary may revoke a church's tax-exempt status, or before a summons proceeding may be stayed, respectively. Had Congress intended to deny any discretion to the IRS with respect to the requirements of section 7611, it would surely have required "complete" compliance.

Finally, MSC argues that the interpretation of the Court of Federal Claims, which we adopt above, "completely eviscerate[s] all of the critical protections which Congress--in light of the requirements of the First Amendment--intended to give churches under [section 7611]." MSC relies on portions of the legislative history, which it interprets to generally support the conclusion that Congress enacted section 7611 in order to protect religious organizations against procedural violations during IRS audits or examinations.

We cannot agree with this argument. We agree that Congress intended to convey benefits to churches in connection with their IRS affairs, and at the same time appreciate the bargain that Congress struck in terms of churches' ability to convert IRS lapses into anti-enforcement swords. The plain meaning of subsection 7611(e)(2), as well as the legislative history, indicates that there can be no doubt that Congress intended for remedies for violations of the procedural requirements of the Act to be strictly limited. This interpretation of subsection 7611(e)(2) does not necessarily leave churches without any remedy for the violation of subsection 7611(c)(2) by the IRS during a church audit or examination. Section 7611 does not by its terms supplant or replace the remedies enjoyed by ordinary taxpayers when confronting the IRS. Thus, Congress must have intended the Act to supplement, not supplant, the procedural protection and

remedies that exist for an ordinary taxpayer. Indeed, subsection 7611(e)(1) is a taxpayer protection device not ordinarily available to the public. Accordingly, although a church may not assert a violation of a requirement of section 7611 (apart from those noted in subsection 7611(e)(1)) as a defense or as the basis of a declaratory judgment, a church may still assert any defense or challenge that is available for an ordinary taxpayer. Indeed, both parties agreed at oral argument that a church would have a remedy under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, for a violation of a requirement of section 7611.

MSC's reliance on *United States* v. *Church of Scientology, Western United States*, 973 F.2d 715 (9th Cir.1992), and *United States* v. *Church of Scientology of Boston, Inc.*, 933 F.2d 1074 (1st Cir.1991) is misplaced. These cases, in a different procedural posture, addressed the standard that the IRS must satisfy when summoning documents for a church examination. In these summons enforcement cases, violation of a procedural requirement of section 7611 was not asserted as a defense, nor as a basis for a declaratory judgment action. Accordingly, the proper interpretation of subsection 7611(e)(2) was not directly, or implicitly, before the court in either of these cases, and the decisions have no bearing on our inquiry in the present case.

In summary, we conclude that, properly interpreted, subsection 7611(e)(2) precludes attack on the Commissioner's revocation decision on the ground that the audit exceeded the two years provided in subsection 7611(c)(1). Accordingly, we hold that the Court of Federal Claims did not err when it denied MSC's motion for summary judgment on the ground that the

IRS' Final Determination letter was untimely.

III

Finally, we address the government's alternative argument that subsection 7611(i) applies to this case. Subsection 7611(i) provides that "[t]his section shall not apply to ... (4) any willful attempt to defeat or evade any tax imposed by this title." The government asserts that because MSC willfully attempted to evade federal income tax, pursuant to subsection 7611(i), the other provisions of section 7611 do not apply at all to this case and MSC is therefore not entitled to seek relief for a violation of the two year time limit set forth in subsection 7611(c)(1). In support of its motion for summary judgment, the government relied on evidence from a general jury verdict in a tax case in which MSC was not a party, and findings by the Tax Court regarding MSC that involved different tax years. The Court of Federal Claims declined to address this alternative theory.

The government correctly notes that we may affirm the Court of Federal Claims' judgment on any ground supported by the record. *See Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 481, 96 S.Ct. 2158, 48 L.Ed.2d 784 (1976); *Glaxo, Inc.* v. *TorPharm, Inc.* 153 F.3d 1366, 1371 (Fed. Cir.1998). But the facts relied upon by the government to show MSC as a willful tax evader, described above, add up to less than that conclusion. Because the record proffered by the government does not support the alternative ground for affirmance, we reject that ground.

CONCLUSION

For the reasons set forth above, we affirm the denial of MSC's motion for summary judgment that the IRS' Final Determination letter was void as untimely under subsection 7611(c)(1).

AFFIRMED

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 96-396 T

MUSIC SQUARE CHURCH

v.

THE UNITED STATES

JUDGMENT

Pursuant to the stipulation for entry of judgment filed April 9, 1999, and the court's instructions dated April 14, 1999, authorizing the Clerk to enter judgment pursuant to Rule 58,

IT IS SO ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed with prejudice. No costs or attorney fees are to be assessed against either party.

April 15, 1999

Margaret M. Earnest
Clerk of Court
/s/ Debra R. Samler
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 96-396 T
Filed: April 30, 1998

MUSIC SQUARE CHURCH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Plaintiff argues that IRS did not issue a final adverse determination letter within the two-year period as required by 26 U.S.C. § 7611. As a result, the letter was not sufficient to revoke their tax exempt status.

Section 7611(e) provides the exclusive [sic] for violation of this requirement. Subsection (e)(2) includes the following: "No suit may be maintained, and no defense may be raised in any proceeding . . . by reason of any noncompliance by the Secretary with the requirements of this Section."

26 C.F.R. § 301.7611-1 establishes that "a declaratory judgment proceeding involving a determination of tax-exempt status under § 7428" is included in the "judicial proceedings" for which § 7611(e) is the exclusive remedy. We cannot find a reasonable argument why these provisions do not preclude plaintiff's claim concerning the two-year limit. Therefore, that argument is stricken from this case.

Counsel will advise the court no later than May 8 whether plaintiff has other issues that it wishes to pursue in this court. We expect to resolve this case in the near future.

/s/ Robert H. Hodges
ROBERT H. HODGES, JR.
Judge

APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 96-396 T
Filed: August 24, 1998

MUSIC SQUARE CHURCH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Plaintiff's motion for summary judgment is based on its assertion that the Final Adverse Determination letter issued by the IRS was mailed almost two years late and therefore void, leaving Music Square Church exempt from tax under I.R.C. § 501(c)(3). Defendant moved to dismiss for lack of a justiciable issue. Specifically, defendant claims that this court should exercise discretionary authority and decline to hear the merits of plaintiff's case because no matter what the outcome, plaintiff will still owe the Government millions of dollars in taxes.

We ruled in an April 30 Order that I.R.C. § 7611(e)(2) provided the exclusive remedy for violations of the two-year inquiry limitation in I.R.C. § 7611(c). Thus the timeliness argument was stricken from plaintiff's case. Plaintiff made an oral motion for reconsideration and that motion is denied. Defendant's motion for summary judgment is denied.

DISCUSSION

A church tax inquiry may be made when a reasonable belief exists that the church may not be tax-exempt or that it may be carrying on an unrelated business that is subject to tax. I.R.C. § 7611(a). However, § 7611 imposes restrictions on the Secretary when conducting church tax inquiries and examinations. I.R.C. § 7611(c)(1)(A) requires that tax examinations under § 7611 be completed "not later than the date which is 2 years after the examination notice date." Plaintiff claims that because the church examination and inquiry was not completed within the required 2 year period, the final adverse determination letter was invalid.

Section § 7611(e)(2) establishes the exclusive remedy for violations of the church inquiry and examination procedures. It states:

> **Remedy to be exclusive.** No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in paragraph (1)), by reason of any noncompliance by the Secretary with the requirements of this section.

Plaintiff asserts that the two-year limitation is not a procedural requirement, but rather a substantive one.[1/] A substantive requirement would not be included in the exclusive remedy of § 7611(e)(2). According to plaintiff, § 7611(e)(2) applies only to summons enforcement proceedings and not to violations of the two-year examination limitation.

Regulation 301.7611-1 applies I.R.C. § 7611(e)(2). Question 13 under the heading "Procedural Time Limitations," states that the IRS is required to complete church inquiries and examinations within two years after the date the notice of examination is mailed to the church. The running of the two-year period is suspended where a judicial proceeding is brought by the church against the IRS, "even though § 7611(e) describes the exclusive remedy for a violation of church tax inquiry and examination procedures: see Q and A-17 . . . ."

Question 17 asks what remedy is available for violation of church inquiry and examination procedures. Regulations 301.7611-1 recites the statutory language of § 7611(e)(2). It states that failure to comply with [sic] requirements of § 7611 "may not be raised as a defense or affirmative ground for relief in any judicial proceeding including, but not limited to, a summons proceeding to gain access to church records; *a declaratory judgment proceeding involving a determination of tax-exempt status under section 7428* . . . ." (emphasis added).

[1/] Plaintiff's argument stems from the title to subsection (e): "Information not collected in substantial compliance with procedures to stay summons proceeding."

Section 7611(e)(2) applies by its terms to the *section*, not just to subsection (e). The time limits imposed by § 7611(c) are not exempted from the exclusive remedy of § 7611(e)(2). Contrary to plaintiff's assertion, the regulations consider the two-year limitation to be a procedural requirement. *See* Regulation 301.7611-1 (Q-13). When reading a statute, the purpose is expressed by the ordinary meaning of the words. *Jones.* v. *Brown*, 41 F.3d 634, 638 (Fed. Cir. 1994). Congress did not mean for § 7611(e)(2) to apply only to subsection (e).

Plaintiff argues that if § 7611(e)(2) applies to the entire section there would be no remedy for churches; churches would be unable to litigate their tax-exempt status. This is not accurate. Plaintiff's remedy is to prove that it qualifies for tax-exempt treatment. "[I]mproper IRS procedures cannot be advanced as grounds for relief in a declaratory judgment proceeding." *Church of Gospel Ministry Inc.* v. *United States*, 640 F. Supp. 100 (D.D.C. 1986).

Defendant moves to dismiss plaintiff's complaint for lack of a justiciable issue claiming that Music Square Church is a "shell corporation which engages in no activities whatsoever and which has outstanding against it unpaid judgments which make it impossible ever to be other than a shell." According to defendant, 26 U.S.C. § 7428 is discretionary and requires an "actual controversy" before this court could hear the case on its merits. Defendant reasons that because plaintiff must use donations to satisfy an outstanding judgment, no donor wanting to give money to the church would make such a contribution

knowing that it would not be used for religious purposes. We cannot engage in such speculation. Section 7428 states in part:

> (a) Creation of remedy.--In a case of actual controversy involving--
>
> (1) a determination by the Secretary--
>
> (A) with respect to the initial or continuing qualifications of an organization as an organization described in section 501(c0(3) which is exempt from tax under section 501(a) . . . .,
>
> upon the filing of an appropriate pleading, the United States Court of Federal Claims . . . may make a declaration with respect to such initial qualifications or continuing qualification . . . .

A case of actual controversy exists where there is an "IRS decision which directly affects an organization's classification or qualification for tax exempt treatment." *McLennan* v. *United States*, 23 Cl. Ct. 99, 103 (1991) (citing *Baptist Hospital Inc.* v. *United States*, 851 F.2d 1397 (Fed. Cir. 1988). The actual controversy in this case is whether plaintiff is entitled to tax-exempt status.

To determine whether plaintiff is operating a "shell corporation," or a corporation for non-religious purposes, we must examine the merits of this case. We cannot accept defendant's conclusory statements for these purposes.

Plaintiff's motion for summary judgment is DENIED. Defendant's motion to dismiss is DENIED. Counsel will agree on a trial date during October and notify the court within 10 days.

/s/ Robert H. Hodges
ROBERT H. HODGES, JR.
Judge

APPENDIX F
STATUTES INVOLVED

26 U.S.C. § 501 provides in pertinent part:

Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation. --An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503 . . .

(c) List of exempt organizations. --The following organizations are referred to in subsection (a): . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. § 7611 provides:

Restrictions on church tax inquiries and examinations

(a) Restrictions on inquiries.--

(1) In general.--The Secretary may begin a church tax inquiry only if--

(A) the reasonable belief requirements of paragraph (2), and

(B) the notice requirements of paragraph (3), have been met.

(2) reasonable belief requirements.--The requirements of this paragraph are met with respect to any church tax inquiry if an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing) that the church--

(A) may not be exempt, by reason of its status as a church, from tax under section 501(a), or

(B) may be carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities subject to taxation under this title.

(3) Inquiry notice requirements.--

(A) In general.--The requirements of this paragraph are met with respect to any church tax inquiry if, before beginning such inquiry, the Secretary provides written notice to the church of the beginning of such inquiry.

(B) Contents of inquiry notice.--The notice required by this paragraph shall include--

(i) an explanation of--

(I) the concerns which gave rise to such inquiry, and

(II) the general subject matter of such inquiry, and

(ii) a general explanation of the applicable--

(I) administrative and constitutional provisions with respect to such inquiry (including the right to a conference with the Secretary before any examination of church records), and

(II) provisions of this title which authorize such inquiry or which may be otherwise involved in such inquiry.

(b) Restrictions on examinations.--

(1) In general.--The Secretary may begin a church tax examination only if the requirements of paragraph (2) have been met and such examination may be made only--

(A) in the case of church records, to the extent necessary to determine the liability for, and the amount of, any tax imposed by this title, and

(B) in the case of religious activities, to the extent necessary to determine whether an organization claiming to be a church is a church for any period.

(2) Notice of examination; opportunity for conference.--The requirements of this paragraph are met with respect to any church tax examination if--

(A) at least 15 days before the beginning of such examination, the Secretary provides the notice described in paragraph (3) to both the church and the appropriate regional counsel of the Internal Revenue Service, and

(B) the church has a reasonable time to participate in a conference described in paragraph (3)(A)(iii), but only if the church requests such a conference before the beginning of the examination.

(3) Contents of examination notice, et cetera.--

(A) In general.--The notice described in this paragraph is a written notice which includes--

(i) a copy of the church tax inquiry notice provided to the church under subsection (a),

(ii) a description of the church records and activities which the Secretary seeks to examine,

(iii) an offer to have a conference between the church and the Secretary in order to discuss, and attempt to resolve, concerns relating to such examination, and

(iv) a copy of all documents which were collected or prepared by the Internal Revenue Service for use in such examination and the disclosure of which is

required by the Freedom of Information Act (5 U.S.C. 552).

(B) Earliest day examination notice may be provided.--The examination notice described in subparagraph (A) shall not be provided to the church before the 15th day after the date on which the church tax inquiry notice was provided to the church under subsection (a).

(C) Opinion of regional counsel with respect to examination.--Any regional counsel of the Internal Revenue Service who receives an examination notice under paragraph (1) may, within 15 days after such notice is provided, submit to the regional commissioner for the region an advisory objection to the examination.

(4) Examination of records and activities not specified in notice.--Within the course of a church tax examination which (at the time the examination begins) meets the requirements of paragraphs (1) and (2), the Secretary may examine any church records or religious activities which were not specified in the examination notice to the extent such examination meets the requirement of subparagraph (A) or (B) of paragraph (1) (whichever applies).

(c) Limitation on period of inquiries and examinations.--

(1) Inquiries and examinations must be completed within 2 years.--

(A) In general.--The Secretary shall complete any church tax status inquiry or examination (and make a

final determination with respect thereto) not later than the date which is 2 years after the examination notice date.

(B) Inquiries not followed by examinations.--In the case of a church tax inquiry with respect to which there is no examination notice under subsection (b), the Secretary shall complete such inquiry (and make a final determination with respect thereto) not later than the date which is 90 days after the inquiry notice date.

(2) Suspension of 2-year period.--The running of the 2-year period described in paragraph (1)(A) and the 90-day period in paragraph (1)(B) shall be suspended--

(A) for any period during which--

(i) a judicial proceeding brought by the church against the Secretary with respect to the church tax inquiry or examination is pending or being appealed,

(ii) a judicial proceeding brought by the Secretary against the church (or any official thereof) to compel compliance with any reasonable request of the Secretary in a church tax examination for examination of church records or religious activities is pending or being appealed, or

(iii) the Secretary is unable to take actions with respect to the church tax inquiry or examination by reason of an order issued in any judicial proceeding brought under section 7609,

(B) for any period in excess of 20 days (but not in excess of 6 months) in which the church or its agents fail to comply with any reasonable request of the Secretary for church records or other information, or

(C) for any period mutually agreed upon by the Secretary and the church.

(d) Limitations on revocation of tax-exempt status, etc.–

(1) In general.--The Secretary may--

(A) determine that an organization is not a church which–

(i) is exempt from taxation by reason of section 501(a), or

(ii) is described in section 170(c), or

(B)(i) send a notice of deficiency of any tax involved in a church tax examination, or

(ii) in the case of any tax with respect to which subchapter B of chapter 63 (relating to deficiency procedures) does not apply, assess any underpayment of such tax involved in a church tax examination,

only if the appropriate regional counsel of the Internal Revenue Service determines in writing that there has been substantial compliance with the requirements of this section and approves in writing of such revocation, notice of deficiency, or assessment.

(2) Limitations on period of assessment.–

(A) Revocation of tax-exempt status.--

(i) 3-year statute of limitations generally.--In the case of any church tax examination with respect to the revocation of tax-exempt status under section 501(a), any tax imposed by chapter 1 (other than section 511) may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, only for the 3 most recent taxable years ending before the examination notice date.

(ii) 6-year statute of limitations where tax-exempt status revoked.--If an organization is not a church exempt from tax under section 501(a) for any of the 3 taxable years described in clause (i), clause (i) shall be applied by substituting "6 most recent taxable years" for "3 most recent taxable years".

(B) Unrelated business tax.--In the case of any church tax examination with respect to the tax imposed by section 511 (relating to unrelated business income), such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, only with respect to the 6 most recent taxable years ending before the examination notice date.

(C) Exception where shorter statute of limitations otherwise applicable.-- Subparagraphs (A) and (B) shall not be construed to increase the period otherwise

applicable under subchapter A of chapter 66 (relating to limitations on assessment and collection).

(e) Information not collected in substantial compliance with procedures to stay summons proceeding.--

(1) In general.--If there has not been substantial compliance with--

(A) the notice requirements of subsection (a) or (b),

(B) the conference requirement described in subsection (b)(3)(A)(iii), or

(C) the approval requirement of subsection (d)(1) (if applicable),

with respect to any church tax inquiry or examination, any proceeding to compel compliance with any summons with respect to such inquiry or examination shall be stayed until the court finds that all practicable steps to correct the noncompliance have been taken. The period applicable under paragraph (1) or subsection (c) shall not be suspended during the period of any stay under the preceding sentence.

(2) **Remedy to be exclusive**.--No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in paragraph (1)), by reason of any noncompliance by the Secretary with the requirements of this section.

(f) Limitations on additional inquiries and examinations.--

(1) In general.--If any church tax inquiry or examination with respect to any church is completed and does not result in--

(A) a revocation, notice of deficiency, or assessment described in subsection (d)(1), or

(B) a request by the Secretary for any significant change in the operational practices of the church (including the adequacy of accounting practices),

no other church tax inquiry or examination may begin with respect to such church during the applicable 5-year period unless such inquiry or examination is approved in writing by the Secretary or does not involve the same or similar issues involved in the preceding inquiry or examination. For purposes of the preceding sentence, an inquiry or examination shall be treated as completed not later than the expiration of the applicable period under paragraph (1) of subsection (c).

(2) Applicable 5-year period.--For purposes of paragraph (1), the term "applicable 5-year period" means the 5-year period beginning on the date the notice taken into account for purposes of subsection (c)(1) was provided. For purposes of the preceding sentence, the rules of subsection (c)(2) shall apply.

(g) Treatment of final report of revenue agent.--Any final report of an agent of the Internal Revenue Service shall be treated as a determination of the Secretary under paragraph (1) of section 7428(a), and any church receiving such a report shall

be treated for purposes of sections 7428 and 7430 as having exhausted the administrative remedies available to it.

(h) Definitions.--For purposes of this section--

(1) Church.--The term "church" includes--

(A) any organization claiming to be a church, and

(B) any convention or association of churches.

(2) Church tax inquiry.--The term "church tax inquiry" means any inquiry to a church (other than an examination) to serve as a basis for determining whether a church--

(A) is exempt from tax under section 501(a) by reason of its status as a church, or

(B) is carrying on an unrelated trade or business (within the meaning of section 513) or otherwise engaged in activities which may be subject to taxation under this title.

(3) Church tax examination.--The term "church tax examination" means any examination for purposes of making a determination described in paragraph (2) of--

(A) church records at the request of the Internal Revenue Service, or

(B) the religious activities of any church.

(4) Church records.--

(A) In general.--The term "church records" means all corporate and financial records regularly kept by a

church, including corporate minute books and lists of members and contributors.

(B) Exception.--Such term shall not include records acquired--

(i) pursuant to a summons to which section 7609 applies, or

(ii) from any governmental agency.

(5) Inquiry notice date.--The term "inquiry notice date" means the date the notice with respect to a church tax inquiry is provided under subsection (a).

(6) Examination notice date.--The term "examination notice date" means the date the notice with respect to a church tax examination is provided under subsection (b) to the church.

(7) Appropriate high-level Treasury official.--The term "appropriate high- level Treasury official" means the Secretary of the Treasury or any delegate of the Secretary whose rank is no lower than that of a principal Internal Revenue officer for an internal revenue region.

(i) Section not to apply to criminal investigations, etc.--This section shall not apply to--

(1) any criminal investigation,

(2) any inquiry or examination relating to the tax liability of any person other than a church,

(3) any assessment under section 6851 (relating to termination assessments of income tax), section 6852

(relating to termination assessments in case of flagrant political expenditures of section 501(c)(3) organizations), or section 6861 (relating to jeopardy assessments of income taxes, etc.),

(4) any willful attempt to defeat or evade any tax imposed by this title, or

(5) any knowing failure to file a return of tax imposed by this title.

Supreme Court, U.S.
FILED
OCT 25 2000
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No. 00-488

In the Supreme Court of the United States

MUSIC SQUARE CHURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court may award declaratory relief against the United States for an alleged violation of 26 U.S.C. 7611(c)(1)(A) by the Internal Revenue Service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 218 F.3d 1367. The order of the United States Court of Federal Claims (Pet. App. 18a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2000. The petition for a writ of certiorari was filed on September 29, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Music Square Church was founded by Tony and Susan Alamo. In 1981, petitioner was recognized by the Internal Revenue Service as a tax-exempt organization under 26 U.S.C. 501. On April 5, 1996,

however, the Commissioner of Internal Revenue made a final determination that petitioner was *not* properly organized and operating as an exempt institution. The Commissioner therefore revoked petitioner's tax-exempt status, effective April 3, 1981. The Commissioner gave the following reasons for that determination: (i) petitioner was formed and operated by Tony Alamo for the principal purpose of willfully attempting to defeat or evade federal income tax; (ii) petitioner was so closely operated and controlled by, and for the benefit of, Tony Alamo that it enjoyed no substantive independent existence; and (iii) petitioner failed to operate exclusively for charitable purposes. Pet. App. 2a-3a.

2. Petitioner thereafter filed a petition for declaratory relief in the Court of Federal Claims contending that its tax-exempt status had been improperly revoked. In addition to asserting that petitioner was in fact qualified as a tax-exempt organization under 26 U.S.C. 501(c)(3), petitioner argued that the Commissioner's adverse determination was invalid because the Service had not completed its examination of petitioner's activities within two years of the issuance of the examination notice, as required by 26 U.S.C. 7611(c)(1)(A). The original notice of examination had been issued by the Service on December 20, 1989. The final adverse determination notice was not issued until April 5, 1996. Petitioner contended that the revocation notice was barred by 26 U.S.C. 7611(c)(1)(A), which generally specifies that the Service is to "complete any church tax status inquiry or examination (and make a final determination with respect thereto) not later than" two years after the notice of examination is issued. *Ibid.*

The Court of Federal Claims rejected petitioner's contentions. Pet. App. 18a-23a. The court concluded that the failure of the Service to complete its examination within the two-year period specified by Section 7611(c)(1)(A) does not bar the Service's final determination because the statute further provides that, with the exception of specified types of actions that this case does *not* involve, "[n]o suit may be maintained, and no defense may be raised in any proceeding * * * by reason of any noncompliance by the Secretary with the requirements of this section." 26 U.S.C. 7611(e)(2). The court held that petitioner could therefore prevail in this case only by showing that the Commissioner's revocation of petitioner's tax exempt status was erroneous on the merits. Pet. App. 17a, 21a.

Petitioner advanced no arguments challenging the merits of the Commissioner's determination. Instead, on April 9, 1999, the parties filed a stipulation for the entry of judgment in favor of the United States, reserving for petitioner the right to appeal. Pet. App. 15a.

3. The court of appeals affirmed. Pet. App. 2a-14a. The court noted that Section 7611(e) expressly provides the exclusive remedy under the statute and that, "by the plain language of the statute, a suit may not be maintained, nor may a defense be raised based on the violation by the IRS of subsection 7611(c)(1)." Pet. App. 8a. The court further noted that "the legislative history confirms Congress' intent that there is to be no judicial remedy for the IRS' failure to comply with" the two-year examination period or "any of the [other] requirements in section 7611, aside from the exclusive remedy described in subsection 7611(e)(1)" for particular administrative actions not involved in this case. Pet. App. 9a (citing H.R. Conf. Rep. No. 861, 98th

Cong., 2d Sess. 1113 (1984)). The court emphasized that, in providing in Section 7611(e)(2) that a judicial remedy would not be available for any failure to complete an examination within two years, the legislative history makes clear that "Congress meant what it said." Pet. App. 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Section 7611 of the Internal Revenue Code sets forth specific procedures for the Internal Revenue Service to follow in initiating and conducting tax examinations of churches. Under Section 7611(a), the Secretary of the Treasury may begin a "church tax inquiry" only when "an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing)" that the church: (i) may not be exempt, by reason of its status as a church, from tax under 26 U.S.C. 501(a); or (ii) may be carrying on an unrelated trade or business within the meaning of 26 U.S.C. 513. 26 U.S.C. 7611(a)(2). Before beginning a church tax inquiry, the Secretary is to provide written notice of the inquiry to the church. 26 U.S.C. 7611(a)(3). An examination of church records may be begun only after written notice of the examination has been given and the church has been provided with an opportunity for a conference. 26 U.S.C. 7611(b). Section 7611(c)(1), upon which petitioner relies, further provides that "[t]he Secretary shall complete any church tax status inquiry or examination (and make a final determination with respect thereto) not later than the date which is 2

years after the examination notice date." 26 U.S.C. 7611(c)(1)(A).

Upon completion of an examination, the Secretary may determine that the organization does not qualify as a tax-exempt church and is not eligible to receive tax-deductible contributions. The Secretary may also issue a notice of deficiency or assess any resulting underpayment of tax. 26 U.S.C. 7611(d)(1). The Secretary may do so, however, "only if the appropriate regional counsel * * * determines in writing that there has been substantial compliance with the requirements of this section and approves in writing of such revocation, notice of deficiency, or assessment." *Ibid.*

Under Section 7611(e)(1), if there has not been substantial compliance with the notice requirements of subsection (a) or (b), the conference requirement of subsection (b)(3)(A), or the approval requirement of subsection (d)(1), "any proceeding to compel compliance with any summons with respect to such inquiry or examination shall be stayed until the court finds that all practicable steps to correct the noncompliance have been taken." Section 7611(e)(2) then expressly provides that *no other or different relief may be granted* to enforce the provisions of this statute (26 U.S.C. 7611(e)(2)):

> REMEDY TO BE EXCLUSIVE.-No suit may be maintained, and no defense may be raised in any proceeding (other than as provided in [§7611(e)(1)]), by reason of any noncompliance by the Secretary with the requirements of this section.

The courts below correctly concluded that, under the express remedial limitations set forth in Section 7611(e), petitioner was not entitled to relief for any alleged violation of Section 7611(c)(1)(A). With the sole

exception of the remedy of a stay of summons enforcement proceedings provided under Section 7611(e)(1), the plain language of the statute bars *any* other remedy "by reason of any noncompliance * * * with the requirements of this section." 26 U.S.C. 7611(e)(2). When, as here, the language of the statute is clear, "the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

b. Petitioner errs in contending (Pet. 10-17) that the only consequence of Section 7611(e)(2) is to make the remedy provided in subsection (e)(1) the exclusive remedy for violations of the specific requirements listed in that subsection. The plain language of the statute refutes that contention. Section 7611(e)(2) expressly states that the remedy provided in subsection (e)(1) is the sole remedy for "any noncompliance * * * with the requirements of this section [Section 7611]." 26 U.S.C. 7611(e)(2). Moreover, subsection (e)(1) does not itself impose requirements for church examinations. The requirements for such examinations are set forth in subsections 7611(a), (b), (c) and (d). Since Section 7611(e)(1) provides the exclusive remedy for "*any* noncompliance" by the Service with the requirements for church audits set forth in Section 7611 (26 U.S.C. 7611(e)(2) (emphasis added), and since the relief sought by petitioner in this case is not authorized by Section 7611(e)(1), the requested relief is expressly barred by Section 7611(e)(2).

c. The court of appeals correctly concluded that the history of the statute supports this straightforward reading of the plain language of its text. As the court succinctly stated, petitioner's argument is "undone by the legislative history of subsection 7611(e)." Pet. App.

9a. The House Conference Report states that, under the statute, "the exclusive remedy for *any* IRS violation of the church audit procedures" is the remedy provided in Section 7611(e)(1). H.R. Conf. Rep. No. 861, *supra*, at 1113 (emphasis added). Indeed, the Conference Report specifically addresses and repudiates the very contention raised by petitioner in this case. The Report states that (*id.* at 1114) (emphasis added):

> [a]side from the exclusive remedy [provided by Section 7611(e)(1)], there is to be no judicial remedy for IRS violation of any of the church examination procedures provided by the conference agreement. *IRS failure to comply with any of these requirements may not be raised as a defense or an affirmative ground for relief in any judicial proceeding including, but not limited to, * * * a declaratory judgment involving a determination of tax-exempt status* (sec. 7428).

As the court of appeals correctly concluded, "[t]his legislative history confirms that Congress meant what it said" in providing that the remedy provided in Section 7611(e)(1) is the exclusive remedy for any violation of any provision of Section 7611. Pet. App. 10a.

2. Petitioner errs in contending (Pet. 18-27) that the decision in this case is irreconcilable in "its approach" to the decision of the Ninth Circuit in *United States* v. *Church of Scientology Western United States*, 973 F.2d 715 (1992), and the decision of the First Circuit in *United States* v. *Church of Scientology of Boston, Inc.*, 933 F.2d 1074 (1991). Neither of those decisions considered or addressed the question presented in this case. In both of those cases, the courts instead dealt with the burden that the Internal Revenue Service

must meet to obtain an order enforcing a summons for documents in a church examination. Those courts held that the Service must show that the documents sought were "necessary" for the examination (as provided in Section 7611(b)(1)(A) and (B)) rather than merely showing that the documents are "relevant" for the examination (which is the standard that generally applies in summons enforcement proceedings under *United States* v. *Powell*, 379 U.S. 48 (1964)).

Petitioner mistakenly argues that those courts awarded relief for the violation by the Service of a "requirement" contained in Section 7611(b)(1) and (contrary to the decision in this case) thereby conferred a remedy that is not authorized in Section 7611(e)(1). Petitioner claims that the "approach" of those decisions is therefore inconsistent with the decision in this case. Pet. 21. The court of appeals correctly rejected that contention. Pet. App. 12a. As the court stated, "[i]n these summons enforcement cases, violation of a procedural requirement of section 7611 was not asserted as a defense, nor as a basis for a declaratory judgment action." *Ibid.* The conclusion reached on the different question presented in those cases thus does not conflict with the decision in this case, for "the proper interpretation of subsection 7611(e)(2) was not directly, or implicitly, before the court in either of these cases." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The government's brief in opposition is in fact a studied effort at evasion. The brief merely reiterates the reasoning and conclusions of the court of appeals, repeatedly qualifying both as "correct" but without any consideration of the principal objections to those conclusions and arguments raised in the Church's petition.

- The government makes no attempt to explain why Congress would have engaged in a futile legislative act by intentionally imposing an unenforceable or illusory two-year limitation period within which the Internal Revenue Service "shall" complete a church tax status examination.

- The government makes no attempt to explain why the authors of the statute would have carefully inserted *tolling* provisions for a limitation period that is itself unenforceable. (See § 7611(c)(2)(B) and (C); Pet. 9, 13.)

- The government fails even to mention the fact that the IRS previously acknowledged that if it failed to complete a church tax status examination within the limitation period, it had to close the examination without revoking the church's tax-exempt status. Congress is presumed to have been aware of the agency's interpretation when it reenacted the statute without any pertinent change in 1996 and 1998. (See *Founding Church of Scientology of Washington, D.C.* v. *United States*, 26 Cl. Ct. 244, 245 (1992); Pet. 9-10, 24.)

- The government ignores *all* of the passages from the legislative history that support the Church's position, including the statements that CAPA's provisions

"*emphasize* the need for a speedy determination of church tax liabilities" and that the purpose of the limitation period was to "avoid unconstitutional entanglement" between church and state (emphasis added; see Pet. 26, 29). Instead, the government, like the court of appeals, focuses on a single passage from the legislative history whose import is inconclusive. (Br. 7.) Nothing in that passage necessitates the conclusion that the authors of the statute had the limitation period in mind when they spoke of "procedures" and "requirements" for which the exclusive remedy was the stay of summons imposed by § 7611(e)(1). When read in conjunction with other statements in the legislative history – to which no reference is made either in the government's brief or in the opinion of the court of appeals – the passage refers only to the provisions that the statute specifically identifies as "requirements," and *not* to the portions of the statute identified as "limitations" and "restrictions."

- The government fails to explain how its view that the two-year limitation period is unenforceable can be reconciled with the express statement in § 7611(e)(1) that the limitation period will continue to run during any stay of proceedings imposed as a remedy for a violation of the requirements listed in that subsection.

The government attempts to confront only two of the Church's claims directly, but in the first instance its argument is largely self-contradictory, and in the second instance it both misrepresents the Church's view and also ends up contradicting itself:

(1) The government denies that the court of appeals' decision

conflicts with the decision of the First Circuit in *United States* v. *Church of Scientology of Boston, Inc.*, 933 F.2d 1074 (1991) (Breyer, J.) and with that of the Ninth Circuit in *United States* v. *Church of Scientology Western United States*, 973 F.2d 715 (1992), yet in almost the same breath asserts that the court of appeals properly concluded that the "remedy provided in Section 7611(e)(1) is the exclusive remedy for any violation of *any provision* of Section 7611." (Br. 7) (emphasis added). As indicated at length, however, in the Church's petition (18-19), the two *Church of Scientology* decisions imposed remedies – ones not contemplated by § 7611(e)(1) – for failures to comply with § 7611(b)(1), the provision of the statute that imposes the heightened necessity standard. The government does not attempt to argue that § 7611(b)(1) is not a "provision" of the statute. Therefore, the government's stance is self-contradictory, for either § 7611(e)(1) provides the exclusive remedy for "any violation of any provision of Section 7611," in which case both of the *Scientology* decisions were wrongly decided, or else those decisions were properly decided, in which case § 7611(e)(1) does *not* provide the exclusive remedy for all of the statute's provisions.

The government tries to escape from this consequence by repeating the court of appeals' statement that a "violation of a procedural requirement of section 7611 was not asserted as a defense, nor as a basis for a declaratory judgment," in either of the two earlier cases. (Br. 8.) As indicated in the Church's petition (21-23), in both of the earlier cases it is precisely a violation of one of the statute's procedures that was asserted as a defense, and therefore the court of appeals' statement is either

inaccurate on its face, or is based on a distinction between "procedural" and "substantive" provisions which is nowhere supported by the language or structure of the statute and for which the court of appeals failed to provide any explanation whatsoever – let alone any explanation for why the two-year time limitation should be considered as "procedural" rather than "substantive." The government, of course, does not address any of the Church's arguments concerning this issue, but merely contents itself with repeating the court of appeals' statement word for word as if its conclusive meaning were transparent.

(2) The government distorts the Church's position by stating that the Church "errs in contending that the only consequence of Section 7611(e)(2) is to make the remedy provided in subsection (e)(1) the exclusive remedy for violations of the specific requirements listed in that subsection." (Br. 6.) The Church does not make that contention; indeed, the petition for certiorari specifically states that § 7611(e)(2) "also establishes that there is no judicial remedy for the 'reasonable belief requirement' set forth in § 7611(a)(2)." (Pet. 12.) What the Church *does* contend is that the plain meaning of the term "requirements" used in § 7611(e)(2) must be understood in relation to the term's use in the provisions specifically identified as "requirements" – as opposed to "restrictions" and "limitations" – elsewhere in the statute. "A term appearing at several places in a statutory text is generally read in the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). Further, since most of those provisions are in fact *listed* in § 7611(e)(1), the Church contends that the two

subparagraphs of § 7611(e) must be read together, and not as unrelated linguistic acts. The Church founded its discussion of these two related points on the principles of efficiency and internal consistency in statutory construction as formulated in the decisions of this Court and in other authorities, but the government's brief has not a word to say about the merits or demerits of a statutory construction that renders the statute unenforceable. Instead, the brief repeatedly, and laconically, puts forward the view that the plain language of the statute refutes the Church's position.

The government's frequent, but unsupported, repetition of this argument does not make it convincing. A good illustration of the government's understanding of the statute's plain language occurs where the brief asserts that § 7611(e)(1) "does not itself impose requirements." (Br. 6.) This is an odd assertion, for § 7611(e)(1) provides that if the IRS has failed to comply with the listed requirements, "any summons with respect to [the] inquiry or examination *shall be stayed* until the court finds that all practicable steps to correct the noncompliance have been taken." (Emphasis added.) Under the government's own interpretation of the term "requirements" in § 7611(e)(2) – to wit, that it refers to all of the statute's provisions – the quoted language ("shall be stayed") from § 7611(e)(1) must simply constitute another provision of the statute, and must therefore set forth another unenforceable "requirement," just like the two-year limitation provision of § 7611(c)(1) where the term "shall" also appears. The assertion that § 7611(e)(1) "does not itself impose requirements" illustrates the false logic that necessarily results from the

government's attempts to justify its particular interpretation of the statute's plain language. By attempting to make sense of the statute's language without following the semantic distinctions drawn by the structure and vocabulary of the text as a whole, the government presents a version of the statute that is essentially self-contradictory.[1/]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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[1/] At any rate, the assertion that § 7611(e)(1) "does not itself impose requirements" also evades the issue, for with the single exception of the "reasonable belief requirement" of § 7611(a)(2) (see the Church's petition at 12), all of the provisions of the statute that specifically define themselves as "requirements" are listed in § 7611(e)(1). The distinction between "setting forth" and "listing" thus fails to bridge the logical gap between the statutory provisions that specifically set forth "requirements," and the other provisions of the statute that set forth "limitations" and "restrictions."